



## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648-XC907]

#### **Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Port San Luis Breakwater Repairs in Avila Beach, California**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; request for comments on proposed renewal incidental harassment authorization (IHA).

**SUMMARY:** NMFS received a request from the U.S. Army Corps of Engineers (ACOE) for the renewal of their recently expired incidental harassment authorization (IHA) to take marine mammals incidental to Port San Luis breakwater repairs in Avila Beach, California. These activities consist of activities that are covered by the initial authorization but were not completed prior to its expiration. Pursuant to the Marine Mammal Protection Act, prior to issuing the initial IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed renewal not previously provided during the initial 30-day comment period.

**DATES:** Comments and information must be received no later than [*insert date 15 days after date of publication in the FEDERAL REGISTER*].

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, and should be submitted via email to [ITP.harlacher@noaa.gov](mailto:ITP.harlacher@noaa.gov).

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period.

Comments, including all attachments, must not exceed a 25-megabyte file size.

Attachments to comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act> without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Jenna Harlacher, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application, renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at:

<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. In case of problems accessing these documents, please call the contact listed above.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

The Marine Mammal Protection Act (MMPA) prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow,

upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, an incidental harassment authorization is issued.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). Monitoring and reporting of such takings are also required. The meaning of key terms such as “take,” “harassment,” and “negligible impact” can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency’s regulations at 50 CFR 216.103.

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed 1 year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a renewal for this activity, and requested public comment on a potential renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time 1-year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2) the activities as described in the Description of the Specified Activities and

Anticipated Impacts section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a renewal would allow for completion of the activities beyond that described in the **DATES** section of the notice of issuance of the initial IHA, provided all of the following conditions are met:

1. A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond 1 year from expiration of the initial IHA).
2. The request for renewal must include the following:
  - An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).
  - A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.
3. Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed renewal. A description of the renewal process may be found on our website at:

[www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals](http://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals). Any comments received on the potential renewal, along with

relevant comments on the initial IHA, have been considered in the development of this proposed IHA renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested renewal, and agency responses will be summarized in the final notice of our decision.

### **National Environmental Policy Act**

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of an IHA renewal) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental take authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS determined that the issuance of the initial IHA qualified to be categorically excluded from further NEPA review. NMFS has preliminarily determined that the application of this categorical exclusion remains appropriate for this renewal IHA.

### **History of Request**

On April 27, 2021, NMFS issued an IHA to the ACOE to take marine mammals incidental to Port San Luis breakwater repairs in Avila Beach, California (86 FR 22151, April 27, 2021), effective from April 1, 2022 through March 31, 2023. On March 28, 2023, NMFS received an application for the renewal of that initial IHA. As described in the application for renewal IHA, the activities for which incidental take is requested consist of activities that are covered by the initial authorization but were not completed

prior to its expiration. As required, the applicant also provided a preliminary monitoring report, which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

### **Description of the Specified Activities and Anticipated Impacts**

Port San Luis breakwater is approximately 2,400 feet (730 m) long and 20 feet (6 m) wide. Repair identified in the initial IHA was designed to focus on the most heavily damaged 1,420 feet (430 m) at the seaward end of the breakwater. The footprint of the breakwater would not be changed, but the crest elevation would be raised 3 feet (1 m) from +13 feet Mean Lower Low Water (MLLW) to +16 feet MLLW for hydraulic stability, to accommodate larger armor stone, to meet design criteria, and to account for sea level rise. Repair work could potentially extend to the seabed to ensure a stable slope and structural stability is maintained.

The project was initially described as consisting of the repair of a deteriorating breakwater at Port San Luis, California. The project is required to protect Port San Luis Harbor and maintain safe navigability within the port. Repair work includes minor excavation of shoaled sediment (~15,000 cubic yards (11,470 cubic meters)) adjacent to the leeward side of the breakwater to create adequate depths for barges and support boats to access the breakwater for the repair. Approximately 29,000 tons (26,310 metric tons) of existing stone would need to be reset and 60,000 tons (54,430 metric tons) of new stone (stones range from 5 to 20 tons (4.5-18.1 metric tons) each) would be placed to restore the most heavily damaged portion of the breakwater. The project was expected to take no more than 174 work days over 7 months.

Due to a combination of contracting and weather delays only a subset of the activities in the initial IHA were completed. Specifically, under the initial IHA, the ACOE has completed: (1) excavation of shoaled sediment adjacent to the leeward side of

the breakwater to create adequate depths for barges and other vessels to access the breakwater for the repair work, (2) repair of 450 feet (137.2 meters) of the breakwater. This renewal request is to cover the subset of the activities covered in the initial IHA that will not be completed during the effective IHA period due to project delays. The remaining breakwater repair work under the renewal IHA would involve completing the remaining 970 feet (295.7 meters) of repairs of the breakwater and is expected to take no more than 162 workdays.

The likely or possible impacts of the ACOE's proposed activity on marine mammals could involve both non-acoustic and acoustic stressors and is unchanged from the impacts described in the initial IHA. Potential non-acoustic stressors could result from the physical and visual presence of the equipment, vessels, and personnel. Acoustic stressors include effects of heavy equipment operation, rock setting, and sediment movement. The effects of underwater and in-air noise and visual disturbance from the ACOE's proposed activities have the potential to result in Level B harassment of marine mammals in the action area.

#### *Detailed Description of the Activity*

A detailed description of the construction activities for which take is proposed here may be found in the notices of the proposed and final IHAs for the initial authorization (86 FR 14579, March 17, 2021; 86 FR 22151, April 27, 2021). As previously mentioned, this request is for a subset of the activities authorized in the initial IHA that would not be completed prior to its expiration due to project delays. The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notice for the initial IHA. The proposed renewal IHA would be effective from May 1, 2023 through March 31, 2024.

#### *Description of Marine Mammals*

A description of the marine mammals in the area of the activities for which

authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the notice of the proposed IHA for the initial authorization (86 FR 14579, March 17, 2021). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA (86 FR 14579, March 17, 2021).

#### *Potential Effects on Marine Mammals and their Habitat*

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which the authorization of take is proposed here may be found in the notice of the proposed IHA for the initial authorization (86 FR 14579, March 17, 2021). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

#### *Estimated Take*

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the notices of the proposed and final IHAs for the initial authorization (86 FR 14579, March 17, 2021; 86 FR 22151, April 27, 2021). Specifically, days of operation, area or space within which harassment is likely to occur, and marine mammal occurrence data applicable to this authorization remain unchanged from the previously issued IHA. Similarly, the stocks taken, methods of take, daily take estimates and types of take remain unchanged from the previously issued IHA. The number of takes proposed for authorization in this renewal are a subset of the initial authorized takes



that better represent the amount of activity left to complete. These takes, which reflect the lower number of remaining days of work (162), are indicated below in Table 1.

**Table 1—Proposed Amount of Taking, by Level B Harassment, by Species and Stock and Percent of Take by Stock**

Species	Stock	Proposed Take	Percent of stock
Harbor seal	California	1,674	5.4%
Steller sea lions	Eastern DPS	3,124	7.2%
California sea lion	U.S.	48,933	19%

*Description of Proposed Mitigation, Monitoring and Reporting Measures*

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the FR notice announcing the issuance of the initial IHA, and the discussion of the least practicable adverse impact included in that document remains accurate (86 FR 22151, April 27, 2021). The following mitigation, monitoring, and reporting measures are proposed for this renewal:

- Monitoring must take place from 30 minutes prior to initiation of construction activity (*i.e.*, pre-start clearance monitoring) through 30 minutes post-completion of construction activity.
- The ACOE must avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary to avoid direct physical interaction.
- Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead Protected Species Observer (PSO) to determine the shutdown zones clear of marine mammals. Construction may commence when the determination is made.
- If construction is delayed or halted due to the presence of a marine mammal, the

activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal.

- The Holder must use soft start techniques. Soft start requires contractors and equipment to slowly approach the work site creating a visual disturbance allowing animals in close proximity to construction activities a chance to leave the area prior to stone resetting or new stone placement. Contractors shall avoid walking or driving equipment through the seal haulout. A soft start must be implemented at the start of each day's construction activity and at any time following cessation of activity for a period of 30 minutes or longer.
- Vessels would approach the breakwater perpendicular to the area they need to be as much as is feasible to minimize interactions with pinnipeds on or near the breakwater.
- The Holder must ensure that construction supervisors and crews, the monitoring team, and relevant ACOE staff are trained prior to the start of construction activity subject to this IHA, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project must be trained prior to commencing work.
- Construction activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within a 200 m Level B harassment zone.
- Construction work will start at the landward end of the breakwater as much as feasible.
- The ACOE must employ one protected species observers (PSOs) to monitor the shutdown and Level B harassment zones.

- Monitoring will be conducted 30 minutes before, during, and 30 minutes after construction activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from construction activity.
- The ACOE must submit a draft report detailing all monitoring within 90 calendar days of the completion of marine mammal monitoring or 60 days prior to the issuance of any subsequent IHA for this project, whichever comes first.
- The ACOE must prepare and submit final report within 30 days following resolution of comments on the draft report from NMFS.
- The ACOE must submit all PSO datasheets and/or raw sighting data (in a separate file from the Final Report referenced immediately above).
- The ACOE must report injured or dead marine mammals.

### **Comments and Responses**

As noted previously, NMFS published a notice of a proposed IHA (86 FR 14579, March 17, 2021) and solicited public comments on both our proposal to issue the initial IHA for Port San Luis breakwater repairs and on the potential for a renewal IHA, should certain requirements be met. During the 30-day public comment period, NMFS received no comments on either the proposal to issue the initial IHA for the ACOE's construction activities or on the potential for a renewal IHA.

### **Preliminary Determinations**

The proposed renewal request consists of a subset of activities analyzed through the initial authorization described above. In analyzing the effects of the activities for the initial IHA, NMFS determined that the ACOE's activities would have a negligible impact on the affected species or stocks and that authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.*, less than one-third the abundance of

all stocks). The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) ACOE's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action; and, (5) appropriate monitoring and reporting requirements are included.

### **Endangered Species Act**

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

### **Proposed Renewal IHA and Request for Public Comment**

As a result of these preliminary determinations, NMFS proposes to issue a renewal IHA to the ACOE for conducting Port San Luis breakwater repairs in Avila Beach, Ca, from May 1, 2023 through November 31, 2023, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed and final initial IHA can be found at

*<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>*. We request comment on our analyses, the proposed renewal IHA, and any other aspect of this notice. Please include with your comments any

supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: April 10, 2023.

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Kimberly Damon-Randall,  
Director, Office of Protected Resources,  
National Marine Fisheries Service.

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